

Rethinking District of Columbia Venue in Voting Rights Preclearance Actions

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INTRODUCTION

In *Shelby County v. Holder* the Supreme Court held that the preclearance provision of the 1965 Voting Rights Act (VRA)¹ was unconstitutional as presently constituted.² Section 5 of the VRA requires certain states, mainly in the Deep South, to preclear certain changes to their election laws before they can go into effect.³ These states must either seek approval from the Department of Justice (DOJ), or file a declaratory judgment action in the United States District Court for the District of Columbia. If a state pursues the latter option, a three-judge district court is convened, and a direct appeal to the Supreme Court is available. Section 4 sets out criteria to determine which jurisdictions are subject to Section 5,⁴ and a majority of the Court held in *Shelby County* that the coverage formula in Section 4 was unconstitutional on federalism grounds, as it was based on decades-old voting data and unfairly singled out a small number of states for disparate treatment.⁵

The majority permitted Congress to revamp and update the Section 4 criteria in response to the decision by tying it to current evidence of voting discrimination in the states.⁶ Following *Shelby County*, an avalanche of scholarly commentary appeared on the constitutionality of Section 5 and various possible legislative fixes to the statute.⁷ Responding to the Court's invitations, members of Congress have introduced bills to adjust Section 4 and other aspects of

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¹ Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (2012)).

² 133 S. Ct. 2612, 2631 (2013).

³ See 42 U.S.C. § 1973c (2012).

⁴ See *id.* § 1973b(b).

⁵ See 133 S. Ct. at 2631.

⁶ *Id.* Justice Thomas concurred on the basis that Section 5 itself was unconstitutional. *Id.* at 2631–32 (Thomas, J., concurring).

⁷ For a small sample of the burgeoning commentary, see, for example, JOSHUA FIELD, CTR. FOR AM. PROGRESS, THE VOTING RIGHTS PLAYBOOK: WHY COURTS MATTER POST-SHELBY COUNTY V. HOLDER (2014), available at www.cdn.americanprogress.org/wp-content/uploads/2014/02/VotingRightsPlaybookReport1.pdf; WILLIAM YEOMANS ET AL., AM. CONSTITUTION SOC'Y, THE VOTING RIGHTS AMENDMENT ACT OF 2014: A CONSTITUTIONAL RESPONSE TO SHELBY COUNTY (2014), available at www.acslaw.org/sites/default/files/Yeomans_Stephanopoulos_Chin_Bagenstos_and_Daniels_-_VRAA_1.pdf; William S. Consovoy & Thomas R. McCarthy, *Shelby County v. Holder: The Restoration of Constitutional Order*, 2013 CATO SUP. CT. REV. 31; Samuel Issacharoff, Comment, *Beyond the Discrimination Model on Voting*, 127 HARV. L. REV. 95 (2013); Ellen D. Katz, *Dismissing Deterrence*, 127 HARV. L. REV. F. 248 (2014); Richard H. Pildes, Forum Response to *Shelby County*, *What Does the Court's Decision Mean?*, 12 ELECTION L.J. 317 (2013); Daniel P. Tokaji, *Responding to Shelby County: A Grand Election Bargain*, 8 HARV. L. & POL'Y REV. 71 (2014) [hereinafter Tokaji, *Responding*]. There was also considerable academic commentary on the constitutionality of Section 5 after its 2006 reauthorization. See, e.g., Daniel P. Tokaji, *If It's Broke, Fix It: Improving Voting Rights Act Preclearance*, 49 HOW. L.J. 785 (2006). There is virtually no discussion in all of this commentary on the issues raised in this Essay.

the VRA.⁸ What is missing from this commentary and these proposals, however, is virtually any discussion of the geographic limitation to the litigation option to apply for preclearance. That is, despite the federalism concerns raised by lodging exclusive venue of such actions in the federal courts for the D.C., neither the Court nor commentators have directly addressed any legal or policy problems with that exclusive venue. This inattention is probably due in large part to the plaintiffs and the numerous amici in *Shelby County* not having explicitly raised the exclusive D.C. venue of preclearance litigation as a federalism concern.⁹

If even the successful critics of Section 5 did not raise this issue, perhaps it is not worth further discussion. Much can be and has been said about VRA preclearance, but one might conclude that all participants and observers are more or less satisfied in litigating preclearance actions in D.C. if they need to be litigated at all. The alternative would be to litigate them in the local federal district courts around the country, that is, the normal venue for most other federal question cases. Despite this silence, more discussion is warranted. At the time of the enactment of the VRA and the first court challenge to it, the exclusive venue of the D.C. courts for preclearance actions was a subject of considerable debate. Similar debates attended the initial legislative reauthorizations of the preclearance provisions. Granted, that public debate has now faded, but the reasons for exclusive D.C. jurisdiction are still problematic. Exclusive venue in the federal courts is usually premised on the perceived need for specialization and uniformity in a particular area of law. The premise of this Essay is that VRA preclearance actions are not one of those areas and the appropriate, and perhaps even more politically palatable, reauthorization of Sections 4 and 5 should divest the D.C. federal courts of exclusive venue to hear such actions.

This Essay proceeds as follows: Part II summarizes the history and controversies attending the passage of Section 5, focusing on the placement of exclusive venue under that provision in the District of Columbia. The same controversy concerned early litigation under that provision and the first two reauthorizations of Section 5, but it eventually dissipated. Part III argues that a reinvigoration of that debate is appropriate for several reasons. The original aims for the exclusive venue are no longer sound today; there is no present need for this type of specialized and exclusive judicial venue; and the jurisprudence on Section 5, should Congress statutorily reauthorize it in the wake of *Shelby County*, could benefit from the normal application of venue rules, which would permit the percolation of issues in federal courts throughout the country. Part IV concludes this Essay.

⁸ See, e.g., Voting Rights Act Amendment Act of 2014, S. 1945, 113th Cong. (2014).

⁹ The plaintiff and its amici in *Shelby County* argued that the preclearance regime was costly and burdensome on those jurisdictions subject to its requirements. But only fleeting reference was made to the burdens, concrete or symbolic, of being forced to litigate declaratory judgment actions in federal court in D.C. See Brief for Petitioner at 25, *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013) (No. 12-96), 2012 WL 6755130 (stating that covered jurisdictions that wish to change their laws must seek DOJ approval, “or embark on expensive litigation in a remote judicial venue if it wishes to make any voting change,” and that “[b]oth routes can be burdensome and require covered jurisdictions to allocate substantial resources to Section 5 compliance”) (emphasis added)). Similarly, the plaintiff’s amici emphasized the monetary and administrative burdens of states needing to comply with preclearance requirements without specifically citing the need to file suits in D.C. See, e.g., Brief of Arizona et al., as Amici Curiae in Support of Petitioners at 23–25, *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013) (No. 12-96), 2013 WL 50688. In contrast, amici supporting the government argued that most preclearance activity was not costly, burdensome, or lengthy, though they did so without directly addressing the need to file suits in D.C. See, e.g., Brief for the States of New York et al., as Amici Curiae in Support of Respondents at 4–9, *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013) (No. 12-96), 2013 WL 432966; Brief for Amici Curiae Section 5 Litigation Intervenors at 19–25, *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013) (No. 12-96), 2013 WL 432972.

I. PRECLEARANCE ACTIONS IN DISTRICT OF COLUMBIA COURTS: CONTROVERSY AND ACQUIESCENCE

The history of the VRA does not need extended treatment here. Although previous federal law, such as the Fifteenth Amendment ratified in 1870, purported to protect voting rights from racial discrimination, African-Americans (particularly in the Deep South) faced almost a century of such discrimination. Pre-1965 laws suffered from both inadequate remedies and less than robust enforcement by the DOJ. It was against this backdrop that Congress passed the VRA in 1965.¹⁰ Congress has amended or reauthorized various provisions of the VRA since then.

For purposes of this Essay, two remedies created by the VRA are worth addressing in depth. One permanent remedy is Section 2, which in its current form creates a private right of action for “aggrieved person[s]” who believe a state electoral practice denies or abridges their constitutional right to vote on account of race.¹¹ Such an action may be brought in any appropriate U.S. District Court, which would otherwise have venue over the action.¹² In contrast, under Section 5, covered jurisdictions must seek approval for changes to certain electoral laws. They can obtain permission by filing either an administrative submission with the DOJ or a declaratory judgment action before a three-judge district court in the District of Columbia.¹³ Among the differences between Section 2 and Section 5 litigation is that under the latter, the law in question stays in place until the requested permission is obtained and the jurisdiction seeking permission has the burden of proof. Under Section 2, the plaintiff has the burden of proof, and any blocking of state voting practice only takes place if the plaintiff prevails.¹⁴

Less well-known are the reasons for the requirement that declaratory judgment actions under Section 5 must be brought in the federal courts for the District of Columbia. Many of the extraordinary provisions of the VRA generated controversy during its passage and enactment in 1965, including the venue requirement of Section 5. One technical reason was that the Attorney General (AG) is the nominal defendant in Section 5 actions, and perhaps the most appropriate venue over the AG is in the seat of the national government. More substantively, some supporters of Section 5 felt that the VRA would receive more expansive, sympathetic, and uniform treatment by federal judges in one jurisdiction. Federal judges sitting in D.C. are not subject to senatorial courtesy in their selection, and thus one might consider them less parochial than their brethren outside of D.C. Otherwise, Section 5 actions would presumably be litigated, like most other federal question cases, in district courts around the country. For most jurisdictions covered by Section 5, this would mean adjudication before district judges

¹⁰ For helpful discussions of the pre-1965 regime and the passage of the VRA itself, see GARY MAY, *BENDING TOWARD JUSTICE: THE VOTING RIGHTS ACT AND THE TRANSFORMATION OF AMERICAN DEMOCRACY* 1–170 (2013); Michael J. Pitts, *Section 5 of the Voting Rights Act: A Once and Future Remedy?*, 81 *DENV. U. L. REV.* 225, 228–30 (2003).

¹¹ 42 U.S.C. § 1973a (2012).

¹² The federal venue statute, 28 U.S.C. § 1391 (2012), would ordinarily govern appropriate venue as it does for most federal question cases. The private right of action authorized by Section 2 of the VRA applies nationwide. See *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2642 (Ginsburg, J., dissenting).

¹³ See 42 U.S.C. § 1973c(a) (2012).

¹⁴ For excellent overviews of litigation under Sections 2 and 5, as well as their differences and similarities, see Pitts, *supra* note 10, at 230–36; Nicholas O. Stephanopoulos, *The South After Shelby County*, 2013 *SUP. CT. REV.* 55, 62–66.

throughout the Deep South, who generally were considered to be more sympathetic to state interests and less so toward African-American plaintiffs seeking to vindicate their voting rights.¹⁵

Indeed, the D.C. venue requirement, along with the rest of Section 5, was challenged on constitutional grounds the year after the VRA's passage in *South Carolina v. Katzenbach*.¹⁶ The DOJ defended the venue requirement with unelaborated allusions to the D.C. court providing convenience and impartiality.¹⁷ The Supreme Court in upholding the VRA noted that state governments would have the burden of litigating actions in D.C., but found that restriction well within Congressional prerogatives to regulate the jurisdiction of the lower federal courts.¹⁸

Justice Hugo Black pressed the point at greater length and with sharper language in his partial dissent. He argued that the venue provision forced states to “entreat federal authorities in faraway places for approval of local laws,” which amounted to treating them as “little more than conquered provinces.”¹⁹ By this, he presumably meant both DOJ officials in D.C. and the federal judges sitting in the District. To gain approval of local laws, states and localities must send “their officials hundreds of miles away.”²⁰ Referencing the Declaration of Independence, he observed that “[o]ne of the abuses complained of most bitterly was the King’s practice of holding legislative and judicial proceedings in inconvenient and distant places.”²¹

Renewed questioning of the Section 5 venue requirement attended the mandated Congressional reauthorizations of that provision in 1970 and 1975. The Nixon Administration and others floated proposals to extend venue to federal courts outside of D.C., but they were rejected, as were most of the efforts to substantively limit Section 5.²² Eventually the venue issue disappeared from the public spotlight, and it was barely mentioned during debates over the 1982 and 2006 reauthorizations over the preclearance provision.²³

What accounts for the fading of the venue issue, especially given that controversy endured over the substantive provisions of preclearance, until the successful challenge in *Shelby County*? Part of the answer is likely the broad acceptance of the many other instances where Congress has provided for mandatory or optional venue of suits or appeals of administrative actions in the federal courts in D.C.²⁴ The exclusive D.C. venue of Section 5 actions is no anomaly, and after

¹⁵ For overviews of the debates and controversies in 1965 over the venue of Section 5 actions, see MAY, *supra* note 10, at 97–98; ABIGAIL M. THERNSTROM, WHOSE VOTES COUNT? AFFIRMATIVE ACTION AND MINORITY VOTING RIGHTS 16–20 (1987); Michael E. Solimine, *Congress, the Solicitor General, and the Path of Reapportionment Litigation*, 62 CASE W. RES. L. REV. 1109, 1138–39 (2012).

¹⁶ 383 U.S. 301 (1966).

¹⁷ See Brief for the Defendant at 79, *South Carolina v. Katzenbach*, 383 U.S. 301 (1966) (No. 22), 1966 WL 100406 (“Trial in a three judge federal court at the Nation’s capital provides a convenient forum and ensures a prompt and impartial determination relieved of local pressures on either hand. There is ample power to confine specialized litigation to a single tribunal.”).

¹⁸ See *Katzenbach*, 383 U.S. at 331.

¹⁹ *Id.* at 359–60 (Black, J., dissenting).

²⁰ *Id.* at 359.

²¹ *Id.* at 359 n.2.

²² See DAVID J. GARROW, PROTEST AT SELMA: MARTIN LUTHER KING, JR., AND THE VOTING RIGHTS ACT OF 1965 194–96 (1978); MAY, *supra* note 10, at 204–09.

²³ During the legislative debate over the 1982 reauthorization of the VRA, Senator Thad Cochran proposed to extend preclearance requirements to election changes in all states. In turn, the proposal would have permitted the jurisdiction to bring a declaratory judgment action in the local federal district court before one district judge. The Senate voted down the proposal. See 128 Cong. Rec. 14,279–82 (June 18, 1982).

²⁴ For an overview of these provisions, see Eric M. Fraser et al., *The Jurisdiction of the D.C. Circuit*, 23 CORNELL J.L. & PUB. POL’Y 131 (2013).

South Carolina, the prospects for a successful legal challenge were dim. Also, as time marched on, governments covered by Section 5 became familiar and comfortable with the process of preclearance centered in D.C.²⁵ Prior to *Shelby County*, the vast majority of preclearance activity took place administratively, when covered jurisdictions took the option of requesting permission from the DOJ.²⁶ By most accounts, most such administrative requests were granted and were neither time-consuming nor costly for the covered jurisdictions.²⁷ In contrast, declaratory judgment litigation in D.C. could be both, not unlike Section 2 litigation elsewhere in the country.²⁸ Perhaps for that reason alone, declaratory suits were relatively rare. Between 1972 and 2012, on average, little more than two such suits were filed per year.²⁹ Finally, perhaps covered jurisdictions (and the DOJ) preferred a three-judge district court with a possible direct appeal to the Supreme Court. Those courts typically consist of two district judges and one circuit judge, and litigants might prefer to have three judges dispose of the potentially difficult and controversial issues raised in Section 5 cases, with a direct appeal possible if necessary. The alternative, presumably, would be litigation analogous to Section 2 actions, meaning a single, local district judge deciding the case followed by normal (and typically less rapid) appellate review thereafter.³⁰

²⁵ That comfort was facilitated by the growth of a specialized bar to handle Section 5 preclearance matters and other VRA issues, and by specialization in the Voting Rights Section of the DOJ. *See e.g.*, Gregory A. Caldeira, *Litigation, Lobbying, and the Voting Rights Bar*, in *CONTROVERSIES IN MINORITY VOTING: THE VOTING RIGHTS ACT IN PERSPECTIVE* 230 (Bernard Grofman & Chandler Davidson eds., 1992) [hereinafter *CONTROVERSIES*].

²⁶ *See Pitts*, *supra* note 10, at 234 n.48 (citing sources indicating that 99% of preclearance requests go to DOJ); Tokaji, *Responding*, *supra* note 7, at 77 (“Between 2000 and 2012, DOJ received approximately 4000 to 7000 preclearance requests per year.”).

²⁷ The amici filings in *Shelby County* debated the point. *See Stephanopoulos*, *supra* note 14, at 25. For purposes of this Essay, I do not take a position on how burdensome Section 5 litigation in D.C. truly is for local governments. In section III *infra*, I argue that exclusive venue in D.C. for Section 5 preclearance actions is unnecessary and inappropriate, even if such litigation is not particularly costly for affected jurisdictions measured by time or money.

²⁸ *See Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2640 (Ginsburg, J., dissenting); Stephanopoulos, *supra* note 14, at 65 (“Full-dress litigation under Section 5 is similar in scope and complexity to a lawsuit under Section 2.”)

²⁹ Between 1972 and 2012, ninety-two declaratory judgment suits pursuant to Section 5 were brought in the D.C. District. *See Section 5 Declaratory Judgment Actions (United States District Court for the District of Columbia)*, U.S. Dep’t of Justice (Oct. 25, 2012) [hereinafter *Section 5 Actions in D.C.*], www.justice.gov/crt/about/vot/sec_5/caselist_ddc.pdf; *see also* Drew S. Days III, *Section 5 and the Role of the Justice Department*, in *CONTROVERSIES*, *supra* note 25, at 53 n.2 (observing that between 1965 and 1991, fewer than twenty preclearance suits were brought).

³⁰ The original drafters of Section 5 could have required that declaratory judgment actions be brought before a single district judge in D.C., followed by normal appellate review. Rather, they borrowed the structure of the then-existing three-judge district court, with direct appeals to the Supreme Court, which as of 1965 was convened to hear constitutional challenges to federal or state statutes. Although these features were unusual, lawmakers thought that three judges, rather than one, ought to decide the potentially sensitive and controversial issues raised by challenges to such statutes, that their collective decision might enjoy greater legitimacy than one by a single judge, and that a direct appeal could provide for prompt review of any such decision. Not long after passage of the VRA, the Supreme Court, in its first major review of the application of Section 5, suggested that Congress adopted a three-judge district court given the federalism concerns raised by a local government seeking the permission of the national government to change its laws. *See Allen v. State Bd. of Elections*, 393 U.S. 544, 562–63 (1969); *see also id.* at 582 n.1 (Harlan, J., concurring in part) (observing that under then-existing statutes, three-judge district court would likely have been convened anyway to hear constitutional challenges to statewide statutes, even in absence of Section 5). The institution of the three-judge district court later fell into disfavor among many federal judges themselves, on the basis that the convening of such courts was awkward and unnecessary, and burdened the Supreme Court with many direct and ostensibly mandatory appeals. In reaction to these concerns, Congress severely downsized the jurisdiction

II. RETHINKING EXCLUSIVE DISTRICT OF COLUMBIA VENUE FOR SECTION 5 SUITS

The majority opinion in *Shelby County* emphasized what it viewed as the extraordinary nature of Section 5, as it required states to obtain federal permission to take certain actions, and then only subjected some states to that requirement.³¹ However contentious the venue for Section 5 actions was at the dawn of the VRA, its salience has considerably diminished since then. Why should we care about it now? There are a number of factors regarding the institutional role of the federal courts that suggest that we revisit this issue as we revisit the continued existence of Section 5 as a whole.

A. District of Columbia Versus Nationwide Venue

Proper venue of federal court actions may seem a highly technical point, even within the legal community. Yet debates over venue have been common throughout the history of the federal court system. Generally, proper venue has been seen as based on the common sense notion that a case filed in federal court, in a large country, should be geographically convenient to the litigants. In addition, or alternatively, venue can be lodged in court where most of the events giving rise to the suit took place.³² But it may not always be so obvious what is convenient or where suits arise, particularly when governmental officials, who spend most of their time in D.C., are the defendants.³³ The District “was extremely inconvenient for plaintiffs who resided elsewhere.”³⁴ Sometimes parties forum-shopped to litigate cases involving government actions in D.C. when, some argued, it was more appropriate to litigate cases before federal judges closer to the events giving rise to the litigation, who could better understand the facts and appreciate the consequences of their actions.³⁵ This local focus is also reflected in the long-standing provisions in the Judicial Code that require circuit and district judges to reside in the circuits and districts to which they have been appointed.³⁶

It is true that the AG is the defendant in declaratory judgment actions under Section 5, and that normally venue over the AG would lie in D.C.³⁷ But it is overly formalistic to suggest that D.C. is the main locus of events giving rise to such suits. Section 5 actions only exist because a

of the court in 1976, leaving it intact for only reapportionment and a few other cases. *See generally* Solimine, *supra* note 15, at 1136–41 (discussing history of and changes to the three-judge district court). But that negative reaction was not strongly apparent in 1965, and there seemed little constituency for changing the three-judge district court in subsequent reauthorizations of Section 5. Probably the modest number of suits brought in DC under Section 5 was a strong factor in the reticence to modify that aspect of Section 5. *See supra* note 27 and accompanying text.

³¹ *See Shelby Cnty.*, 133 S. Ct. at 2624–25.

³² *See generally* 14D CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE §§ 3801–02 (4th ed. 2008) (general overview of federal venue statutes).

³³ *See id.* § 3815.

³⁴ *Id.* § 3815, at 330.

³⁵ A well-known example of this debate is the controversy in the early 1980s over environmental suits brought by private plaintiffs in D.C. regarding land and other issues in the far West. *See id.* § 3815, at 330 & n.17; Cass R. Sunstein, *Participation, Public Law, and Venue Reform*, 49 U. CHI. L. REV. 976, 998–99 & n.105 (1982).

³⁶ 28 U.S.C. §§ 44(c) (circuit judges), 134(b) (district judges) (2012). “Presumably [these provisions were] meant to lead to greater efficiencies (a judge need not travel as far) or to inspire public confidence (by having a person with local ties be a federal official, as opposed to a largely absent officer).” Michael E. Solimine, *Nepotism in the Federal Judiciary*, 71 U. CIN. L. REV. 563, 573 (2002).

³⁷ *See* 28 U.S.C. § 1391(e)(1)(A) (2012) (explaining when defendant is officer of the United States, venue may be district where defendant resides).

local election change needs the approval of federal governmental officials. Standard venue rules permit local district courts to hear such actions.³⁸ The appropriateness of local district courts hearing preclearance actions is also reflected by the fact that some actions are already venued outside of D.C. The AG and private parties may bring what are called “Section 5 enforcement actions” in local district courts to challenge the failure of a covered jurisdiction to seek preclearance for an election law change.³⁹

Familiar venue practices, then, do not provide a firm grounding for insisting that venue for Section 5 preclearance actions must exclusively be vested in D.C. But it might be argued that such actions are still distinct enough from other federal question cases to justify their own venue rules. These arguments do not stand up to scrutiny. First, consider one aspect of the historical context of the original passage of Section 5. The common assumption at the time was that if Section 5 provided for local venue, its application would be placed at risk by hostile or unsympathetic federal district judges. Whatever truth there may have been to this assumption,⁴⁰ it clearly dissipated by the early 1970s. By that time, “segregation-era southern Democrats” had retired and been replaced by presumably more enlightened judges nominated by both Republican and Democratic Presidents.⁴¹ At the very least, over forty years after the initial passage of Section 5, it seems highly simplistic to assume that federal judges in the South are invariably unsympathetic to voting rights issues as compared to judges elsewhere in the nation.⁴²

Next consider the selection of D.C. as a specialized court to hear Section 5 actions. Specialized courts are said to possess virtues not shared by their general jurisdiction counterparts. These virtues include permitting a small group of judges to gain expertise on a particular subject

³⁸ See *id.* § 1391(e)(1)(B) (2012) (explaining when defendant is officer of the United States, venue may be district where “a substantial part of the events or omissions giving rise to the claim occurred”).

³⁹ Pitts, *supra* note 10, at 236 (internal quotation marks omitted). For further discussion of these actions, see *infra* Part III.B.

⁴⁰ The ideological dispositions of federal judges in the Deep South at this time are more complicated than this assumption indicates. There is evidence that at least some federal district judges (often appointed by Democratic Presidents) were indeed hostile to civil rights, while some of the judges on the Fifth Circuit (including some recent appointees of Republican President Eisenhower) were not. For this reason, the three-judge district court was seen by some civil rights litigators in the 1950s and 1960s as a favorable forum in the South, since it did not leave them trapped before a possibly hostile single district judge. For further discussion, see Michael E. Solimine, *Congress, Ex Parte Young, and the Fate of the Three-Judge District Court*, 70 U. PITT. L. REV. 101, 125–32 (2008). On this understanding, Section 5 could have provided that preclearance cases be filed before local three-judge district courts.

⁴¹ J. Morgan Kousser, *The Strange, Ironic Career of Section 5 of the Voting Rights Act, 1965–2007*, 86 TEX. L. REV. 667, 691 (2008). *But cf.* C.K. ROWLAND & ROBERT A. CARP, *POLITICS AND JUDGMENT IN FEDERAL DISTRICT COURTS* 58–86 (1996) (providing data on differences in decisionmaking over time between federal district judges in the North and South on race relations and other issues, and suggesting that southern judges were more conservative into the 1970s and beyond).

⁴² The empirical literature on federal judicial decisionmaking in voting rights cases suggests that the partisan background, not sharp regional differences, provides the best predictor of judicial behavior. See Adam B. Cox & Thomas J. Miles, *Judging the Voting Rights Act*, 108 COLUM. L. REV. 1, 46 (2008) (studying decisions under Section 2 of the VRA); Mark Jonathan McKenzie, *The Influence of Partisanship, Ideology, and the Law on Redistricting Decisions in the Federal Courts*, 65 POL. RES. Q. 799, 803 (2012). The impact of partisan background may itself be overstated. See James B. Cottrill & Terri J. Peretti, *Gerrymandering from the Bench? The Electoral Consequences of Judicial Redistricting*, 12 ELECTION L.J. 261, 262 (2013); Solimine, *supra* note 15, at 1143–44. I am unaware of any empirical studies directly examining decisionmaking by federal judges in Section 5 preclearance actions. Absent such a study caution should be used before assuming D.C. judges are fundamentally different from other federal judges when deciding VRA cases. *Cf.* Cox & Miles, *supra*, at 49 n.137 (acknowledging the possibility that judicial behavior in Section 5 actions might differ from those brought under Section 2).

matter, perhaps one considered particularly intellectually challenging or important. In theory, the quality of judicial output should be higher, as the judges will develop and apply the law more coherently and uniformly. There can also be vices associated with specialized courts, such as politicized judicial selection, capture by a specialized bar, and boredom for the judge forced to deal with the same topic.⁴³ The three-judge district court in D.C. to hear Section 5 actions only convenes periodically, and its judges will otherwise work with a generalist docket, so the court is not likely to fully possess either the virtues or the vices of a standing specialized court.

That said, what justifies using D.C. as the locale for Section 5 court actions? For several decades, the U.S. Court of Appeals for D.C. has been regarded as the second-most important court in the country. This reputation is based on both the District of D.C. and D.C. Circuit dealing with high-profile environmental and other important administrative law cases. Judges in D.C. are regarded as being highly qualified and able to expertly handle intellectually challenging cases. Judges on the D.C. Circuit are regularly on the short list for appointment to the Supreme Court, and four of the current Justices are Circuit alumni.⁴⁴

Both the Circuit and District judges in D.C. are rightly lauded for their high qualifications and legal acumen. They can also be regarded as experts, as compared to the federal judiciary as a whole, on administrative law issues, which due to venue provisions constitute a disproportionately large part of their docket. But it does not follow that they are experts on VRA issues in general or Section 5 litigation in particular. It would be a stretch to label these cases as merely administrative law. In my judgment, VRA and Section 5 cases usually present rather ordinary issues of statutory interpretation and constitutional law, for which D.C. judges cannot claim any particular expertise.⁴⁵ In other words, these cases are very similar to cases brought under Section 2, which are litigated outside of D.C.⁴⁶ When it comes to court review of electoral processes, there is something to be said, more so than for ordinary litigation, that the judicial process be regarded by the public as legitimate, that is, both “fair and perceived as fair.”⁴⁷ In my view, the legitimacy of Section 5 preclearance actions in the eyes of the public can be undermined if it is rendered by a distant federal court when a local one could easily be tasked with resolving the case.

⁴³ For a discussion of the pros and cons of specialized courts in the federal (and other) systems, see LAWRENCE BAUM, *SPECIALIZING THE COURTS* 31–41 (2011); RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 249–58 (1996); Edward K. Cheng, *The Myth of the Generalist Judge*, 61 *STAN. L. REV.* 519, 550–60 (2008); Richard L. Revesz, *Specialized Courts and the Administrative Lawmaking System*, 138 *U. PA. L. REV.* 1111, 1116–17 (1990).

⁴⁴ See Michael E. Solimine, *The Fall and Rise of Specialized Federal Constitutional Courts*, 17 *U. PA. J. CONST. L.* (forthcoming 2014) (manuscript at 27–28), available at <http://ssrn.com/abstract=2272627>.

⁴⁵ See, e.g., *Little v. King*, 768 F. Supp. 2d 56, 68 (D.D.C. 2011) (three-judge court) (granting motion under 28 U.S.C. §1404(a) to transfer Section 5 case from D.D.C. to M.D. Ala. in part because non-D.C. federal judges would be familiar with VRA issues).

⁴⁶ See Solimine, *Fall and Rise*, *supra* note 44 (manuscript at 28) (similarly arguing that D.C. judges have no special expertise on the constitutionality of federal legislation, and criticizing some statute-specific provisions which vest exclusive venue of such questions in three-judge district courts in D.C.).

⁴⁷ Joshua A. Douglas, *The Procedure of Election Law in Federal Courts*, 2011 *UTAH L. REV.* 433, 441 (2011) (quoting Steven F. Huefner, *Remedying Election Wrongs*, 44 *HARV. J. ON LEGIS.* 265, 289 (2007)) (internal quotation mark omitted); see also Michael E. Solimine, *The Three-Judge District Court in Voting Rights Litigation*, 30 *U. MICH. J.L. REFORM* 79, 127–28 (1996) (supporting importance of federal courts deciding VRA cases in as nonpolitical manner as possible). Here I am primarily criticizing the D.C. venue of Section 5 actions, not necessarily the convening of three judges to hear the case.

It is difficult to objectively determine if the three-judge district courts in D.C. have overall been rendering decisions in Section 5 cases that demonstrate expertise and uniformity. As noted, there has not been an avalanche of such decisions.⁴⁸ Most declaratory judgment actions are dismissed as moot or otherwise disposed of without reaching the merits. For example, of the ninety-two such actions brought between 1972 and 2012, well over half (fifty-nine) were dismissed by the courts or the parties due to intervening actions or other circumstances, and the courts did not reach the merits. Of the remaining thirty-three, the courts granted eighteen of the requested judgments and denied fifteen. Fifteen of the decisions were appealed to the Supreme Court, which held oral argument and rendered full opinions in eight, and summarily affirmed in five others.⁴⁹ Thus, about one-half of the decisions on the merits were appealed to the Court.⁵⁰

This suggests that the Supreme Court is rarely asked to, and rarely does, intervene to review preclearance decisions from the D.C. courts.⁵¹ If the three-judge district courts in D.C. were rendering preclearance decisions in some manner far afield of the statute, then surely we would see a much higher rate of Supreme Court intervention, not to mention uproar from interested publics. If anything, on the whole, there seems to be general satisfaction, in the election law community at least, with the Section 5 jurisprudence generated by the D.C. judges. Indeed, the DOJ views its separate preclearance role as being a “surrogate” for the D.C. courts.⁵² That is, the DOJ strives to “make the same determination that would be made by the court in an action for a declaratory judgment under section 5.”⁵³ Presumably, the DOJ would not be so deferential if it were systematically dissatisfied with D.C. court decisions on Section 5.

The last observations might suggest that the status quo on venue, should Section 5 (and Section 4) be statutorily revived, be left intact. The arguments and evidence do not all point in one direction, but I am not convinced. With some exceptions, the general norm in American judicial history is for regional dispersion of federal courts, staffed by local federal judges. Presumably, literal closeness to the facts and people giving rise to lawsuits will in most cases lead to better judicial decisions and greater public acceptance of those decisions.⁵⁴ This presumption has been set aside for some categories of cases, where Congress thought that exclusive or optional venue in D.C. would lead to greater uniformity and coherence in a particular area of law. Whatever may be said about Congressional judgment in other areas of law, the presumptive norm of regionalism and localism has not been persuasively overcome for Section 5 actions. The venue of those actions should be in local federal district courts, as with Section 2 actions. Alternatively, local venue for Section 5 actions could be made permissive, so plaintiffs who favored the D.C. courts could still sue in D.C. if they wished. In either case,

⁴⁸ See *supra* note 29 and accompanying text.

⁴⁹ All of the figures were compiled from *Section 5 Actions in D.C.*, *supra* note 29. I have simplified some of the data reported in the text because in a few cases, there were a partial grant and denial of the requested declaratory judgment. I treated those cases as grants. At least one dismissal led to an appeal to the Supreme Court. See *id.*

⁵⁰ This rate of appeal is roughly consistent with the historically high rate of appeal found for all decisions of three-judge district courts, as opposed to the lower rate associated with decisions from single district courts to a U.S. court of appeals. See Solimine, *supra* note 15, at 1145–46.

⁵¹ See, e.g., Peyton McCrary, *How the Voting Rights Act Works: Implementation of a Civil Rights Policy, 1965–2005*, 57 S.C. L. REV. 785, 793 (2006).

⁵² McCrary, *supra* note 51, at 793 (internal quotation marks omitted) (citing 28 C.F.R. § 51.52(a) (2004)).

⁵³ 28 C.F.R. § 51.52(a) (2011).

⁵⁴ See JUDICIAL CONFERENCE OF THE UNITED STATES, LONG RANGE PLAN FOR THE FEDERAL COURTS 43 (1995); Solimine, *supra* note 44, at 28.

defendants could seek transfer of venue from local courts to D.C. if litigation in the latter was more convenient or appropriate.⁵⁵

One possible consequence of changing or increasing the venue options for Section 5 litigation is the possibility of increased litigation.⁵⁶ Even if the administrative preclearance option is on the whole quicker and cheaper than any type of litigation, the possibility of bringing a preclearance action for a declaratory judgment before a local judge (or a local three-judge district court) may be too tempting to pass up. The temptation might be particularly strong if the election law change is neither routine nor uncontroversial, and the covered jurisdiction may feel that it can get a better result with non-D.C. federal judges. The prospect of more Section 5 litigation is surely possible, but in my view it is one worth dealing with, and does not outweigh the benefits of local venue outlined here.

The reframing of venue for Section 5 actions might make the passage of amendments to Sections 4 and 5 more politically palatable. Although the modern critics of Section 5 have not specifically targeted the D.C. venue provision, supporters of post-*Shelby County* statutory reforms should consider adding venue reform to the menu of amendments. It has the potential to ameliorate criticisms of such reforms on the grounds that it is invasive of state prerogatives as was the previous Sections 4 and 5.⁵⁷ Local district courts deciding preclearance actions arguably lessens federal intrusion in both symbolic and concrete ways and mitigates claims of heavy-handed federal intrusion from a distant national capital.

B. Preclearance Litigation Outside of the District of Columbia

If Section 5 litigation was ordinarily venued in local federal district courts, we already know the sky would not fall. The perhaps surprising reason is that for almost as long as Section 5 preclearance actions have been filed, certain types of those actions have been permitted to be filed in local federal courts. The VRA authorizes the AG to file suit in local federal courts to challenge the failure of a covered jurisdiction to seek any type of preclearance for a change to election laws.⁵⁸ The Supreme Court has held that private parties have an implied right of action to enforce that provision as well.⁵⁹ As already noted, both types of actions are referred to as

⁵⁵ Transfer between districts is authorized by 28 U.S.C. § 1404(a) (2012). *Cf.* *Little v. King*, 768 F. Supp. 2d 56, 68 (D.D.C. 2011) (three-judge court) (transferring Section 5 case out of D.D.C. under § 1404(a)). A recent example of the pernicious effects of exclusive D.C. jurisdiction for Section 5 declaratory judgment actions on multiple litigation is *Perry v. Perez*, 132 S. Ct. 934 (2012) (per curiam), which involved simultaneous redistricting litigation before a three-judge district court in Texas and a Section 5 declaratory judgment action regarding the redistricting in D.C. The Supreme Court held that the Texas court, before ordering new relief, must wait for the D.C. court's decision. *See Perry*, 132 S. Ct. at 942. Nonetheless, the exclusive jurisdiction of the D.C. court surely exacerbated the duplication of efforts and the logistical difficulties for the litigants, lawyers, and judges in the case. Those difficulties might have been lessened or eliminated if the Section 5 actions could also have been brought in federal court in Texas. Thanks to Dan Tokaji for bringing this example to my attention.

⁵⁶ Thanks to Josh Douglas for his comments on this point.

⁵⁷ *See, e.g.,* Roger Clegg, *Congressional Dems' Terrible Legislative Fix for the Voting Rights Act*, NAT'L REVIEW ONLINE (Jan. 16, 2014, 10:04 AM), <http://www.nationalreview.com/corner/368625/congressional-dems-terrible-legislative-fix-voting-rights-act-roger-clegg> (criticizing proposed amendments to Sections 4 and 5 on federalism grounds); Ilya Shapiro, *Don't Use MLK to Push Harmful Election Laws*, FORBES (Jan. 22, 2014, 6:27 PM), www.forbes.com/sites/ilyashapiro/2014/01/22/dont-use-mlk-to-push-harmful-election-laws (same).

⁵⁸ *See* 42 U.S.C. § 1973j(d) (2012).

⁵⁹ *See* *Allen v. State Bd. of Elections*, 393 U.S. 544, 555–59 (1969). For a discussion of this aspect of *Allen*, situating it in the Court's larger jurisprudence on implying private rights of action, see Daniel P. Tokaji, *Public*

Section 5 enforcement actions, and both are brought before local three-judge district courts with direct appeals available to the Supreme Court.⁶⁰ Such actions only decide whether the change to election law in question should be subject to the preclearance process; only the DOJ or the D.C. courts thereafter can decide whether the change should be precleared under the substantive provisions of the VRA.⁶¹

How have local federal courts handled such cases? Although useful data exists on Section 5 actions brought in D.C.,⁶² there is apparently no similar information on Section 5 enforcement actions. So a baseline of comparison of the two types of Section 5 litigation is difficult. What we can say is that many more such cases have been brought than the Section 5 actions brought in D.C.⁶³ The Supreme Court has frequently reviewed such cases and those decisions, whether appealed or not, appear to have usefully contributed to the jurisprudence on Section 5 and its application, particularly on the important threshold issue of what voting changes trigger the preclearance requirements.⁶⁴

A second category of preclearance litigation outside of D.C. is those cases under the “bail-in” provisions of Section 3 of the VRA.⁶⁵ This provision requires a local three-judge district court to make findings that a state voting practice is unconstitutional, and then retain jurisdiction to monitor changes to the practice.⁶⁶ There has been little litigation under this provision, although its greater use has been advocated in the post-*Shelby County* world.⁶⁷

These non-D.C. preclearance actions demonstrate that the asserted benefits of exclusive venue in D.C. are overstated. Although the comparisons are necessarily qualitative, it appears that the asserted goals of uniformity, expertise, and nonparochialism have not been undermined by the Section 5 cases litigated outside of D.C.

III. CONCLUSION

Rights and Private Rights of Action: The Enforcement of Federal Election Laws, 44 IND. L. REV. 113, 128–29 (2010).

⁶⁰ See *supra* note 39 and accompanying text.

⁶¹ See *Perry v. Perez*, 132 S. Ct. 934, 942 (2012) (per curiam); *Lopez v. Monterey Cnty.*, 519 U.S. 9, 23 (1996).

⁶² See *supra* note 29.

⁶³ See *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2639 (2013) (Ginsburg, J., dissenting) (referring to more than 100 successful Section 5 enforcement actions brought by the DOJ or private plaintiffs between 1982 and 2006, and citing the legislative history of the 2006 reauthorization of the VRA).

⁶⁴ See generally, e.g., *Riley v. Kennedy*, 553 U.S. 406 (2008); *Lopez v. Monterey Cnty.*, 519 U.S. 9 (1996); *Presley v. Etowah Cnty. Comm'n*, 502 U.S. 491 (1992); *Clark v. Roemer*, 500 U.S. 646 (1991); *City of Lockhart v. United States*, 460 U.S. 125 (1983); *McDaniel v. Sanchez*, 452 U.S. 130 (1981); *Dougherty Cnty. Bd. of Educ. v. White*, 439 U.S. 32 (1978); *Berry v. Doles*, 438 U.S. 190 (1978) (per curiam); *United States v. Bd. of Supervisors*, 429 U.S. 642 (1977); *Connor v. Waller*, 421 U.S. 656 (1975) (per curiam); *Georgia v. United States*, 411 U.S. 526 (1973); *Perkins v. Matthews*, 400 U.S. 379 (1971).

⁶⁵ See 42 U.S.C. § 1973a(c) (2012).

⁶⁶ See *id.* See generally Travis Crum, Note, *The Voting Rights Act's Secret Weapon: Pocket Trigger Litigation and Dynamic Preclearance*, 119 YALE L.J. 992 (2010). In contrast, Section 5 also permits covered jurisdictions to “bailout” of the need for preclearance if they demonstrate compliance with certain standards. These actions must be brought before a three-judge district court in D.C. See 42 U.S.C. § 1973b(a)(5). Under the analysis of this Essay, bailout actions could also be venued in local district courts.

⁶⁷ See Stephanopoulos, *supra* note 14, at 121–22; Paul M. Wiley, Note, *Shelby and Section 3: Pulling the Voting Rights Act's Pocket Trigger to Protect Voting Rights After Shelby County v. Holder*, 71 WASH. & LEE L. REV. (forthcoming 2014).

The proper venue for Section 5 preclearance actions might seem like a classic inside the beltway problem, if a problem it is at all. Although this was a matter of considerable controversy in the early life of preclearance, its salience faded and it was barely mentioned in the litigation culminating in *Shelby County v. Holder*. Nor has it been directly mentioned in the current debate over statutory amendments to Sections 4 and 5 in the wake of *Shelby County* holding the current coverage criteria of Section 4 to be unconstitutional. Perhaps some might conclude that the venue issue is largely a symbolic one. There is some truth to that, but the rationales for exclusive D.C. venue have outlived their usefulness. There are no longer good reasons, if there were any in 1965, to divest local federal courts from hearing Section 5 preclearance actions. As Congress considers statutory fixes to restore the VRA's preclearance regime, it should add provisions that make clear that the normal venue rules apply to such actions.